

The 'International Community' as a Legal Notion

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Christian J. Tams

The ‘International Community’ as a Legal Notion

With a Commentary by Theresa Reinold

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Abstract

The 'international community' is omnipresent in international debates. It is a point of reference. Much international action is undertaken in its name. And many a catastrophe – from Aleppo to climate change – is portrayed as a failure of the international community. As is clear from these random references, the functions, meanings and content of the concept of 'international community' are fluid: it is as appealing as it is evasive – and in fact, often it appeals precisely because it is evasive, and because a wide range of diverse, sometimes competing, meanings and expectations are projected onto it. The working paper seeks to unveil some of the functions, meanings and expectations projected upon the notion of 'international community'. While it focuses on debates in one particular field, viz. international law, its themes are of significance to a wider audience.

Keywords

international community, international law, society, United Nations, law-making

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The 'International Community' as a Legal Notion

*Christian J. Tams*¹

1 Introduction

The 'international community' is a curious notion. Omnipresent and overused, it 'haunts'² international debates, almost like Karl Marx's spectre: it is an article of faith to many, a mere fiction to others; an aspiration, a realistic utopia,³ a tool of in- and exclusion, and perhaps even a 'descendant of the old European "standard of civilization"' (Jackson 2000: 359). International lawyers have found the notion irresistible and regularly use it as a yardstick against which international rules, and international conduct in pursuance of such rules, are assessed. Yet although it has become ubiquitous, the functions, meanings and content of the concept of 'international community' often remain fluid: it is as appealing as it is evasive – and in fact, often it appeals precisely because it is evasive, and because a wide range of diverse, sometimes competing, meanings and expectations are projected onto it. Despite its evasive nature, the 'international community' concept has been woven into the fabric of international law.

The subsequent comment seeks to unveil some of the functions, meanings and expectations projected upon the notion of 'international community'. This it does in three steps: by engaging with the notion of 'international community' ('What's in a name?' – Section 2), by assessing the role of international law in 'international community' projects ('The function of international law in the 'international community' – Section 3), and by evaluating whether such 'international community' projects have influenced aspects of contemporary international law ('The proper law of the international community' – Section 4). Throughout these three steps, the protean character of the concept is emphasised.

¹ This paper expands on arguments made in the author's contribution to Jean d'Aspremont and Sahib Singh, *Concepts for International Law* (Edward Elgar, forthcoming).

² Jouannet (2005: 3), 'une idée qui ne cesse de hanter le discours des juristes internationalistes'.

³ See e.g. Rawls (1999: 11); Cassese (2012).

2 The 'International Community': What's in a Name?

(a) Competing visions of international order

That the term 'international community' should 'haunt' international lawyers (or indeed anyone) does not seem obvious. It sounds innocent enough, and often enough, it is used (innocently, as it were) as a generic reference to the 'countries of the world considered collectively'.⁴ What interests here is the not-so-innocent, not-so-generic use; the one with assumptions. It, too, is common. Entire books have been written to 'prove' the existence of an 'international community'.⁵ Speaking in 1999, shortly after the divisive Kosovo campaign (waged by a few in the name of the 'international community'⁶), and not so long after the Rwandan genocide (during which an outside intervention, including by a few self-proclaimed guardians of the 'international community', might have done wonders), Kofi Annan was defiant: 'The international community does exist. It has an address. It has achievements to its credit. And it is the only way forward' (Annan 1999). Others, perhaps, rather view it as a cul-de-sac. To Ruth Wedgwood, it is 'a dangerous reference point for the naïve' (Wedgwood 2002: 44). And Georg Schwarzenberger thought it 'require[d] a certain sense of humour ... [t]o conceive international relations in terms of a community' (Schwarzenberger 1947: 160) – a sense of humour that Schwarzenberger himself did not seem to appreciate: hence he 'ruthlessly ... interrupted students who used the term "international community" instead of "international society"' (Steinle 2004: 672).

(b) The essential normative claim

These chance quotations perhaps reveal more about the authors' anxieties than about the true state of international relations. But they point towards the essential normative claim embodied in the notion of 'international community' as it is used in most contemporary debates (and as it is understood here). An 'international community' is based not just on bargains and arrangements delimiting spheres of influence and competence between states. Instead, it builds on a threshold of shared values and assumptions, and is designed to give effect to common interests. Andreas Paulus makes the point perceptively: by speaking of an 'international community', he notes, one introduces 'a normative element' and assumes that there is 'a minimum of subjective cohesion to the social bond between its

⁴ See the Oxford English Dictionary, online edition (at https://en.oxforddictionaries.com/definition/the_international_community). In that sense, the 'law of the international community' would be the law in force between the members of the 'international community' at any given point.

⁵ See e.g. Paulus (2001); Villalpando (2005); Payandeh (2010); and further Simma (1994); Tomuschat (1999); Buchan (2008: 3), and Besson (2009: 205). Andreas Paulus' entry 'International Community' in the *Max Planck Encyclopedia of Public International Law*, Paulus (2013) offers a very helpful summary of debates.

⁶ See e.g. Blair (1999), linking the bombing of Kosovo to the emergence 'of a new doctrine of international community'.

members'.⁷ In contemporary analyses, these qualifying elements distinguish a 'community' from other forms of association, which are at times referred to as a 'rabble'⁸ or a 'mere agglomeration'⁹, but most commonly (drawing on a rather creative application of Tönnies' work¹⁰) as a 'society', i.e. a 'functional' association based on instrumental, rational, artificial links and 'contractual arrangements'.¹¹ Unlike rabbles, agglomerations or societies, a community is 'integrated' (Peters 2009: 153), 'welded together' (Abi-Saab 1998: 2049), and united by some 'imperative of solidarity'.¹² While terminology is anything but uniform,¹³ the rationale of the concept seems clear enough: an 'international community' designates a 'closer union' than a society (Tomuschat 1999: 210–11), and a more ambitious, more demanding, form of association. And while the brief references quoted so far emphasise the internal bonds between its members, a community is also 'defined

⁷ Paulus (2013), para. 3; and further Abi-Saab (1998: 249), 'In order to designate a group globally as a "community" it must first constitute a "society": that is to say, it must first attain a certain degree or threshold of intensity and stability (or normality) in relations among its members, enabling them to be identified and distinguished from other subjects found in the same sphere ... Only if this society is welded together by a sense of community, even to very different degrees, over a broad range of matters (that is to say of interests and values), can it be aggregately designated a "community"'.

⁸ Franck (1990: 196), according to whom a rabble 'typically involves unstructured, standardless interactions between actors whose conscious relationship to one another is limited to the circumstance of casual proximity'.

⁹ Peters (2009: 153), suggests that mere agglomerations are different because they lack 'closeness' and 'common objectives'.

¹⁰ In his *Gemeinschaft und Gesellschaft*, first published in 1887, Ferdinand Tönnies distinguished between communities and societies. Communities in his view were characterised by 'organic' bonds, which members internalised and felt subjectively; by contrast, the links between members of a society were artificial and instrumental. This ties in with the idea of a community as a 'closer union', which in turn could explain the prominence of Tönnies in much of the legal literature (see e.g. Paulus (2001); Buchan (2008). However, as Besson (2009: 221), notes, Tönnies' 'traditional distinction between society and community cannot apply as such to the international community'. Tönnies viewed the two forms of integration as alternatives, which may not be in line with today's mainstream approach, according to which the 'international community' is essentially a qualified society: one with social cohesion, as put by Paulus (2013), para. 3. More importantly, in Tönnies' understanding, the modern era was characterised by a move from community-type to society-type relations, not least because relations between members were increasingly shaped by law. All this suggests that 'a little less Tönnies' might benefit the debate.

¹¹ Cf. the description by Buzan (1993: 333–6).

¹² Bliesemann de Guevara/Kühn (2009: 74). See also Hurrell (2007: 5): 'the core idea of solidarism can be seen in the constant appeals to the existence of an "international community" capable of fulfilling a broader range of political and moral purposes'.

¹³ The use of terminology employed by many scholars associated with the 'English school' of international relations deserves to be mentioned, as it is prone to cause confusion. According to Hedley Bull, for example, '[a] society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions': Bull (1977: 162) et seq. In that reading, 'societies' are the closer union; 'communities' do not feature. Robert Jackson tries to link the two concepts; in his view, the 'universal *societas* of States ... is a noticeably thin community': see Jackson (2000: 344).

by what it is not':¹⁴ like gated communities in desirable suburbs, the 'international community' can appear rather exclusive to outsiders and can seek 'to dissociate a miscreant ... from membership'¹⁵.

(c) False dichotomies

The essential normative claim embodied in the notion of an 'international community' is clear enough, but it is also incredibly diffuse. "[C]ommunity' is a relative concept' (Abi-Saab 1998: 249)¹⁶: if some level of normative cohesion is required, then the existence of an 'international community' is indeed 'a question of degree' (Abi-Saab 1998: 249). So much depends on where one draws the line. How much cohesion and integration is required (and between whom) before an association qualifies as a community? What is more, contrary to what the at times heated debate suggests, 'community' and 'society' are not mutually exclusive. As in most differentiated social systems, societal and communitarian forms of relationship co-exist at the international level¹⁷: the question is one of degree, not of principle.

This affects arguments derived from the concept of 'international community'. Rather than permitting clear-cut distinctions, the concept is significant because it reflects a particular perspective on international relations: one that looks beyond states to include individuals, groups, companies; one that is willing to treat shared values as significant motivating factors; and one that adopts a dynamic perspective that contemplates (and values) a transition towards closer unions and the acceptance of limitations on state sovereignty.

(d) The use of the concept in different traditions of thought

Just like these perspectives, the use of the concept of 'international community' is historically contingent. In the modern period, it became common during the UN era, which brought about new levels of integration and prompted scholars to focus on the cooperative dimension of international relations.¹⁸ However, it was only in the 1990s that the concept rose to prominence. As globalisation and technical progress made interdependence a tangible reality, and the end of the Cold War prompted hopes of a new, value-based international order, the 'international

¹⁴ Alkoby (2010: 57).

¹⁵ Chibundu (2004), text after note 149. See also Walzer (1995), ch. 2, recognising a community's 'right of closure'.

¹⁶ See also Alkoby (2010: 40): 'there is no precise moment when a social group becomes a "community"'.

¹⁷ As noted by Max Weber (1972: 21): 'die große Mehrzahl sozialer Beziehungen ... hat teils den Charakter der Vergemeinschaftung, teils den der Vergesellschaftung'.

¹⁸ See Abi-Saab (1998: 249) 'It is the advent of this institutional element which definitively reveals the existence of a sense of community'. For legal perspectives on international law as a 'law of cooperation' see Friedmann (1964).

community' to many seemed an apt term to describe a new, more ambitious stage in international relations.¹⁹

These hopes of course were not universally shared. Critical scholars from different backgrounds queried whether the values of the 'international community' were truly common to its members, or merely imposed – and whether proclamations of an 'international community' did not mainly serve to marginalise dissent.²⁰ From their perspective, the concept appears to be yet another instrument for legitimising existing structures of dominance: "[t]he idea of 'international community' itself is implicated in this relationship of continued domination" (Alkoby 2010: 57). But in the discourse of the 1990s, these were relatively marginal voices: an 'international community project' reflected the optimistic spirit of the post-Cold War era.

While rising to prominence, the concept of 'international community' also became more nuanced. In the mainstream discourse of the 1990s, different strands emerged, which to this date remain significant. Drawing on Andreas Paulus' detailed analysis, these different strands can be broadly grouped into two main camps – two traditions of thought that built on the 'international community' concept to spell out their vision of the international order.²¹

Institutionalist theories of international order are the first such tradition. They emphasise the role of international organisations, and of the UN in particular. Representing the overwhelming majority of states, the UN has a credible claim to be 'carr[ying] the mantle for the international community' (Rocard 2013: 3). In many blueprints, the path towards a value-based community runs via progressive institutionalisation.²² Global institutions thus appear as natural fora in which decisions on questions of community concern are taken: '[i]nternational organization is ... in a very rudimentary sense, an expression of the concept that there is an international community which bears responsibility for dealing with matters that refuse to be confined within national boundaries' (Claude 1971: 447). In that approach, depending on the focus of the argument, the establishment of relevant international organisations during the 20th century symbolises the move from international society towards 'international community',²³ just as much as it can serve as an argument supporting further steps towards institutionalisation.

¹⁹ Paulus (2001) offers a detailed historical account.

²⁰ See the references in Paulus (2001: 2010) et seq.; and further Chibundu (2004); Appardurai (2002: 42).

²¹ The following draws on Andreas Paulus' detailed work: see Paulus (2001).

²² In fact, in the more radical versions, the UN (or even one of its organs) is equated with the 'international community': see Chomsky (2002: 34): 'The literal sense [of the term "international community"] is reasonably clear; the U.N. General Assembly, or a substantial majority of it, is a fair first approximation'.

²³ See e.g. Abi-Saab (1998: 256): '[E]ach level of normative density requires a corresponding level of institutional density in order to enable the norms to be applied in a satisfactory manner. In other words, norms resulting from the law of cooperation approach, however ambitious they may be, cannot have a real social hold without adequate institutional arrangements for

Liberal-cosmopolitan approaches to world order place equal emphasis on the concept of 'international community'. They do not necessarily dispute the significance of institutionalism.²⁴ However, they approach the concept from a different vantage point, viz. from the idea of core liberal values and/or universal human rights. 'A liberal concept of international community', notes Paulus, 'focus[es] on individual rights and duties'. Liberal concepts themselves are rather heterogeneous. Radical calls for a wholesale re-modelling of the international order into a system organised around individuals²⁵ exist alongside proposals that view states as trustees tasked to 'discharge a mandate for the benefits of human beings under their jurisdiction' (Tomuschat 1999: 300).

Liberal-cosmopolitan and institutionalist approaches in many ways overlap; at times they are merged into constitutionalist blueprints, which combine cosmopolitan guarantees and a (typically Charter-based) framework.²⁶ They share an anti-étatist impulse: the state is perceived (also) as a threat to individual rights, and state sovereignty as an obstacle to the effective realisation of community concerns. Liberal and institutional approaches therefore both question the dominant role of states in the international order, or condition it upon the acceptance of basic community concerns (notably human rights). But they emphasise different aspects and point in different directions: where the institutionalist variant relies on international organisations, the liberal variant emphasises the entrenchment of substantive standards: '[t]he institutional expression of liberal values is less important than the protection of individual rights'.²⁷ As will be shown in the following, the two approaches can conflict – and these conflicts in turn allow us to test how the notion of an 'international community' could be operationalised.

applying them. It is the advent of this institutional element which definitively reveals the existence of a sense of community at the basis of the regulation' (references omitted).

²⁴ In fact, institutionalist and liberal readings often go hand in hand: see e.g. Cassese (2002: 45): '[A]t least at the normative level the international community is becoming more integrated and—what is even more important ... such values as human rights and the need to promote development are increasingly permeating various sectors of international law that previously seemed impervious to them'.

²⁵ See e.g. (with many variations between them) Tesón (1992: 53); Buchanan (2003), or more recently Peters (2009).

²⁶ For prominent examples see Peters (2009); Fassbender (1998: 529).

²⁷ Paulus (2013), para. 24.

3 The Function of International Law in the 'International Community'

(a) Generalities

The discussion so far has largely left aside the role of international law within 'international community designs', or at least not tackled them directly. The remainder of this short essay addresses them, doing so in two steps: the present section explores the function of international law in the 'international community' in a general manner; Section 4 then assesses to what extent international law has become a proper law of the 'international community'.

The 'function of [international] law in the international community'²⁸ has occupied international lawyers for decades; perhaps this is the discipline's holy grail. The following considerations focus on one aspect of the broader quest: they map out the role assigned to international law in the community designs summarised so far. While addressing the question from a different vantage point, the discussion continues the theme of Section 2: it seeks to show that, just as the 'international community' is difficult to pin down, so is the role of international law within it. International law is ambivalent, and it is malleable. More specifically, the subsequent considerations make three relatively straightforward points, which are unlikely to be controversial, but are surprisingly often not made:

- International law is an integral element of the 'international community'; it features prominently in most community schemes.
- While relied upon by proponents of an 'international community', international law also offers solace to those who resist integration in a community: it is ambivalent, and often ambiguous.
- Precisely for that reason, international law is an important site of contestation in the struggle to operationalise projects and plans of an 'international community'.

(b) International law as the 'glue' of the 'international community'

To begin, international law is an integral part of debates about the 'international community'. As Bliesemann de Guevara and Kühn (2011: 141) note, many of the demands of the 'international community' projects 'correlate with international law' (Bliesmann de Guevara and Kühn 2011: 141). International law, to be sure, in and of itself is not sufficient to make for a community; it needs to be filled with life, accepted, and considered legitimate. But it offers the natural language in which many debates are conducted, and it can be seen as the 'glue' (Peters 2003: 154) that is meant to hold together a community. Put differently, in the terms used above, international law can reflect the required 'minimum of social cohesion'

²⁸ See Lauterpacht (1933); Allott (1998: 391).

characteristic of a community, and enshrine the 'shared values' on which it is based. In that perspective, international law embodies decisions reached by the members of the community, and conversely helps stabilise them.

In line with this instrumental understanding, the main schools of thought referred to above heavily rely on international law as a 'transmission belt' for community interests. Institutionalists emphasise the significance of constitutional arrangements like the UN Charter, which provide the framework for the 'international community's' action.²⁹ By the same token, the gradual recognition, in multilateral treaties and customary law, of an international bill of rights offers a normative grounding for liberal notions of the 'international community'.³⁰ In both approaches, international law facilitates 'integration' within the 'international community' and helps 'weld [that community] together' (Abi-Saab 1998: 249). Samantha Besson seems to go even further when suggesting that the "'international community' only appeared as it is today through the operation and development of international law" (Besson 2009: 222).

All this suggests that the path towards an 'international community' is paved with normative intentions. Supporters of the concept see in international law a powerful centripetal force. It is worth adding that critics of the community concept do not necessarily disagree: many of them accept that a true community would have to be enshrined in international law; however, in their assessment, international law as it stands does not reflect a sufficient level of cohesion, nor is it sufficiently accepted to matter.³¹ Both approaches view international law as a unifying force that can help shape an international community – though they disagree whether in reality international law is sufficiently developed to produce such effects.

(c) International law's ambivalence

The latter comments point towards a necessary reality check. Of course, international law does not only facilitate the integration of the 'international community'. It is not uni-directional, let alone monolithic – but ambivalent: some strands of international law are conducive to integration, other strands hinder it. As in many other debates, the main line is not between law and non-law, but between the different directions in which legal arguments point. Rather than endorsing one particular (integrated, communitarian) vision of the international order, international law reflects the tensions between community and society, inter- and independence, coexistence and cooperation,³² and as in most other social systems,

²⁹ See e.g. Fassbender (1998).

³⁰ Andreas Paulus refers to the 'unstoppable march of globalization towards the construction of global institutions': Paulus (2013), para. 20.

³¹ Ruth Wedgwood singles out one particular aspect of this when dismissing the 'international community['] s] ... words [that] have no supporting cannon fire': Wedgwood (2002: 46).

³² Martti Koskeniemi argues that this ambivalence characterises '[t]he sense of the legal project' tout court, and that 'the law lacks a principle for choosing either one and therefore contains both within itself': in his view, 'the international legal project ... describes social life among States alternatively in terms of community and autonomy. These descriptions support conflicting demands for freedom and order. In the one case, community is interpreted as negative collectivism and autonomy (independence, self-determination) is presented as the

societal and communitarian relationships co-exist (Weber 1972). For example, international law comprises human rights treaties – but also a resilient principle of sovereign immunity. International law establishes powerful organs of international organisations – but at the same time cherishes consensualism and non-intervention. In grand rhetoric, international law requires disputes to be resolved peacefully – but is content with a minimalist implementation of that requirement, which views negotiation as the default form of settlement. What is more, many rules of international law are ambiguous. Depending on one's perspective, the ban on force can be seen as a milestone on the way towards a community based on law rather than power – or as a roadblock hindering effective action in defence of community interests. The examples could be multiplied, but the essential point will have become clear. International law is an integral part of community schemes. However, enshrining centrifugal forces alongside centripetal ones, it is also a powerful obstacle to the realisation of these schemes.³³

(d) International law as a site of contestation

International law is not only multi-directional. It is also in a process of constant adjustment. Designed to regularise conduct and stabilise normative expectations, it hardly ever changes suddenly. Yet it evolves over time. Evolution can take the form of concerted law-making (e.g. in processes of codification and progressive development) or, more subtly, of the gradual adaptation of the law to changing realities (e.g. through processes of dynamic treaty interpretation or the trickling down of practice into modified custom). In these processes, centripetal and centrifugal forces clash; the resulting law is a product of their interaction. For present purposes, what matters is that law-making and adjustment processes offer opportunities to translate visions of an 'international community' into positive international law, viz. to shape a proper law of the 'international community'. As will be shown below, this has regularly been attempted, with varying degrees of success. Precisely because it is integral to many visions of an 'international community', international law is an important site of contestation. Conversely, an analysis of its evolution can offer insights into the strength of the community concept at various points in time: as the lines between society and community are fluid, and as international law is multi-directional, such an analysis is likely to yield mixed results. But it can point to distinctions between areas of greater and lesser normative integration, and help understand which variants of 'international community' projects have left a heavier footprint than others. In this sense, international law is an important litmus test for 'international community' projects. While a full analysis is well beyond the scope of this short essay, Section 4 offers three small sample tests.³⁴

normative goal. In the other, autonomy is interpreted as negative egoism and community (integration, solidarity) as what the law should aim at. Neither community nor autonomy can be exclusive goals': see Koskeniemi (2005: 476).

³³ Juliane Kokott tries to bring the two aspects together when noting that: 'sovereign equality [on which she focuses, and which would qualify as a 'powerful centrifugal force'] shields public international law against unrealistic demands': Kokott (2013), para. 82.

³⁴ For more detailed analyses see notably Payandeh (2010) and Paulus (2001).

4 The Proper Law of the 'International Community': Selected Sites of Contestation

(a) Three sample tests

To what extent, then, does international law reflect the needs of an 'international community'? To what extent has it opened up to embrace individuals and other non-state actors, and which of its branches have taken up 'community impulses' towards greater cohesion and integration? The subsequent considerations engage with these questions selectively. They address the regime of law-making, the UN Charter's collective security system, and the law of state responsibility – and question to what extent these reflect (or have come to reflect) the 'international community' project's demands. The samples are too selective to support any claim of representativeness, yet they concern different layers of the contemporary legal regime: the first (law-making) is foundational, the second (collective security) addresses a major question of international institutional law, the third (state responsibility) looks at a longstanding attempt to clarify a 'cardinal institution'³⁵ of general international law. The following sub-sections offer three pen portraits of these 'sample areas': cursory assessments of the developments of international law over the course of the past decades, i.e. at a time when the concept of 'international community' in its contemporary form had begun to gain contours and could be expected to influence the evolution of international law.

(b) The 'international community' in the international law-making process

The first pen portrait depicts the process by which international law is made (or adjusted). To what extent is this a community-driven process? Can international law be expressed in forms that suitably reflect an 'international community'?

The traditional regime of law-making offered relatively little to accommodate community concerns. In fact, traditional law-making was premised on two major obstacles: First, linking law-making capacity to legal personality, and reserving legal personality for states, it viewed international law as law agreed between states.³⁶ And second, by consolidating a sources doctrine based on treaties and custom, it emphasised the role of state consent, or state conduct, in the law-making process.³⁷

Unsurprisingly, adherents of community projects have taken issue with both premises. Liberal-cosmopolitan approaches question the centrality of states; in line with their more inclusive understanding, law-making in an 'international

³⁵ Crawford (2006), para. 1.

³⁶ See d'Aspremont (2015: 121–2), 'a correlation ...between states as the subjects of international law and subjecthood [i.e. legal personality] ... Law-making was seen as a matter for subjects of international law'.

³⁷ See Danilenko (1993: 193) 'The existing [i.e. traditional] system of sources of international law reflects a vision of an international order which is based on the co-existence of independent and sovereign states.'

community' could not be reserved for states. Anne Peters makes the point very clearly: 'The concept of an international community suggests inclusiveness, and therefore tends to favour rather than to hinder the inclusion of non-state actors' (Peters 2009: 153). In the same vein, there have been many attempts to free the law-making process from its voluntarist shackles and transform the inter-state law into a properly transnational law of the 'international community'.³⁸

The impact of these initiatives on the regime of law-making has been relatively modest. Six decades after Philip C. Jessup called for a more inclusive treatment of 'all law which regulates actions or events that transcend national frontiers'³⁹ (which he termed *Transnational Law*), it seems fair to say that attempts to include non-state actors in the law-making process have yielded limited results. The doctrine of legal personality may have been opened up to include non-state actors of different types. However, in opening up, it has been de-coupled from law-making powers: 'while international law is no longer created only for states, it remains largely—at least in formal law-making channels—created by states,' observes Samantha Besson (2009: 211). Of course, on the margins, non-state actors are being admitted into the law-making process. The formal treaty-making capacity of international organisations has been recognised,⁴⁰ and there have been attempts to bring agreements concluded with groups or companies into the realm of international law.⁴¹ The conduct of international organisations (including that of their autonomous organs) can affect the interpretation of treaties and identification of custom.⁴² And via the medium of state agencies, non-state actors are pushing law-making agendas, at times effectively.⁴³ But their involvement in the process is mostly indirect, and where it is not, it remains exceptional and concerns discrete issues. For all practical purposes, states have retained control over the international law-making process.⁴⁴

The second obstacle, voluntarism, has come under more strain, but it too has proved relatively resilient.⁴⁵ The close nexus between international law and state

³⁸ For diverse proposals pointing in that direction, see e.g. Domingo (2010); Ziccardi and Capaldo (2008); Wessel (2011: 253).

³⁹ See (Jessup 1956: 2).

⁴⁰ See the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 25 ILM 543 (1986); and further Webb (2014: 567).

⁴¹ Notably through attempts to 'internationalise' State contracts, see Karavias (2014: 597). It is worth adding that these attempts have had modest success at best. In the *Anglo-Iranian Oil Co. case*, which was based on the theory of internationalisation, the ICJ 'would have none of it [...] It simply said, these contracts are governed by municipal law and they are not internationalized at all': (Crawford 2011: 19); and see ICJ Reports (1952: 93).

⁴² See e.g. Kadelbach (2012), para. 36.

⁴³ See Noortmann and Ryngaert (2010); Bothe (2012: 1399).

⁴⁴ d'Aspremont (2015: 121), et seq.; Paulus (2001: 248–9).

⁴⁵ For calls for reform see e.g. the works cited in fn. 37, as well as Charney/Danilenko (1995: 25), 'faced with a number of global problems affecting the interests of every human being on this planet, the international community may find that a constitutional theory based on state consent presents unacceptable obstacles to necessary solutions.' Merdad Payandeh offers a detailed analysis of trends towards more community-oriented forms of law-making: see Payandeh (2010), ch. 6.

conduct is at times stretched, but has not been severed. Treaties and custom, both based on the conduct of states, remain central; by contrast, proposals to treat expressions of community interest – such as General Assembly resolutions or summit declarations – as sources of law in their own right have been given short shrift.⁴⁶ What developments there have been concern the application of the traditional sources, and that of custom in particular. The two component elements of custom – general practice and *opinio juris* – have been deformed and to some extent disconnected from individual state conduct.⁴⁷ Much of contemporary custom is a by-product of UN-sponsored processes of normative clarification: General Assembly Resolutions, ILC Reports and ICJ judgments are regularly treated as a privileged 'source', from which rules of custom are derived⁴⁸. As shortcuts to the 'general practice, accepted as law' required by Article 38(1)(b), they bring custom under the influence of the institutionalised 'international community'.⁴⁹

Two other developments reflect a more direct impact of 'community arguments' on the process of customary law-making. The first concerns the identification of customary rules protecting shared community values. According to a popular claim, there is, for example, room to 'find' customary human rights, or customary rules of war, on the basis of a strong and globally expressed *opinio juris*, including that of expert bodies and human rights courts.⁵⁰ In some instances, such claims are expressly justified by reference to individual rights' centrality to the 'international community' project. However, the more obviously 'creative' applications of this approach have met with opposition, and the recent work of the International Law Commissions views the idea of special regimes of custom identification in 'desirable' fields of law with much caution.⁵¹

The second development is less controversial, but perhaps illustrates the strength of 'community arguments' more clearly. It concerns the impact of state succession on custom. After significant debate, it seems generally accepted today that succession leaves customary rights and obligations unaffected: successor states, including new states that never had an opportunity to contribute to the process of law-making, do not join the 'international community' with a clean slate, but are, from their emergence, bound by rules of customary international law.⁵² They are bound because membership of the international legal community comes

⁴⁶ For proposals see Cheng (1965: 23); Ago (1956: 932), et seq.

⁴⁷ For a clear account see d'Aspremont (2011), ch. 5, assessing the '[d]eformalization of law-ascertainment in the contemporary theory of the sources of international law'.

⁴⁸ See Tams (2015: 59), et seq.

⁴⁹ Danilenko (1993: 193) speaks of a 'movement towards community-based law-making'.

⁵⁰ See the debate and references in d'Aspremont (2013: 73); Frulli (2015: 80)

⁵¹ At an early stage of the project, the ILC's Special Rapporteur set out his view that 'given the unity of international law and the fact that international law is a legal system, it is neither helpful nor in accordance with principle, for the purposes of the present topic, to break the law up into separate specialist fields. The same basic approach to the formation and identification of customary international law applies regardless of the field of law under consideration': Wood (2012), para. 22.

⁵² Thirlway (2014: 97–8). In the words of one of the most prominent commentators, 'a new state is born into a world of law'; see O'Connell (1965: 12).

with rights and duties – and because stability and predictability require it.⁵³ While taken for granted in most contemporary debates, the doctrine of universal automatic succession is perhaps the clearest illustration of how customary law-making is adapted to accommodate the demands of the 'international community'.

In the field of treaty law, voluntarism has been more difficult to water down. Multilateral treaties may be, in Bruno Simma's oft-quoted phrase, 'workhorses of community interest' (Simma 1993: 322). Yet they are agreed in structured processes that emphasise the role of (written, formal) state consent.⁵⁴ Article 34 of the Vienna Convention on the Law of Treaties spells out the cardinal principle when clarifying that '[a] treaty does not create either obligations or rights for a third state without its consent'.⁵⁵ As a consequence, non-participation remains an option: the treaty law of the 'international community' is based on voluntary association.

Debates about state succession illustrate the significant power of voluntarist arguments within the law of treaties. Unlike with respect to customary international law, arguments in favour of automatic succession to treaties have met with significant resistance. Claims that new states should be bound by all treaties entered into by their predecessor⁵⁶ have largely been given up in favour of a narrower doctrine of qualified succession to major world order treaties protecting core interests of the 'international community', such as the Genocide Convention or the Geneva Conventions.⁵⁷ These narrower claims reflect the desire to ensure the legal protection of core community interests during times of rupture – but it is telling that even the narrower argument is by no means accepted⁵⁸

What has been accepted, by contrast, is a limitation on what states can agree to in treaties. The doctrine of peremptory norms (*ius cogens*), the focal point of many debates about the 'anchoring' of community concepts in black letter international law,⁵⁹ demarcates a 'no-go area': treaties that conflict with peremptory norms are void;⁶⁰ in this respect, community interests quite clearly trump state consent. Since its recognition in the Vienna Convention on the Law of Treaties, *ius cogens* has been

⁵³ For contemporary perspectives on the debate see Zemanek (1965: 179); Falk (1966: 26), et seq.; Bedjaoui (1970: 455) and O'Connell (1970: 95).

⁵⁴ See e.g. Article 2(1) (g) of the Vienna Convention on the *Law of Treaties* (VCLT), which defines the term (treaty) party as 'a State which has consented to be bound by the treaty and for which the treaty is in force'. Articles 11-17 VCLT spell out the various ways of expressing consent to being bound.

⁵⁵ According to Sir Gerald Fitzmaurice (1960: 83), the *pacta tertiis* rule is 'so fundamental, self-evident and well-known, that [it] do[es] not really require the citation of much authority in ... support'.

⁵⁶ See notably Article 34(1) of the 1978 Vienna Convention, which adopts automatic succession as the default rule, with an exception for newly independent States, as defined in Article 16. The common view today is that Article 34, which is the key factor explaining the 1978 Convention's poor ratification record, does not reflect custom: Brownlie (2008: 661–2); Aust (2005: 370–1); Cassese (2002: 78).

⁵⁷ See e.g. Human Rights Committee, General Comment 26 (61): Continuity of Obligations, reproduced in ILM 34 (1995: 839); Kamminga (1996: 469); and cf. Rasulov (2003: 141).

⁵⁸ For cautious comment see e.g. Zimmermann/Devaney (2014: 533–6); and (less cautiously) Payandeh (2010: 23) et seq.

⁵⁹ See e.g. Paulus (2001: 329), et seq.; Payandeh (2010: 335) et seq.

⁶⁰ See Article 53 VCLT.

accepted as an important vehicle in translating community interests into positive international law, but it is one which (as has famously been observed) 'hardly ever leaves the garage' (Brownlie 1988: 110), simply because states hardly ever violate peremptory norms *by treaty*. (They do so differently; and the real challenge has been to devise a regime of 'Jus Cogens beyond the Vienna Convention'⁶¹).

The first pen portrait suggests that law-making in the 'international community' remains largely 'societal', with some communitarian sprinkling added for good measure. The legislative function remains a state prerogative, one that is guarded jealously. State consent and conduct remain central, whether it is via custom or treaty, but the voluntarist system is being gradually reformed from within. The reforms sketched out in the preceding section respond to claims advanced in 'international community' projects: they seek to facilitate the protection of core community interests, to preserve such protection during times of rupture and to deny offensive treaties legal validity. All these are 'strains in the system' (Simma 1983: 485), albeit with perhaps rather less impact than one might have expected. The international law of the 'international community' is made in fairly traditional ways.

(c) The 'international community' in the UN's 'peace machinery'

A look at multilateral treaties yields a rather different picture. Treaties may for the most part remain state-made, but they increasingly give expression to interests that transcend inter-state relations. In major standard-setting treaties backed up by institutional structures, the 'workhouse of community interest', in Simma's (1993: 322) phrase, visions of the 'international community' have found their most obvious expression: through them, it gains concrete meaning; the law and practice of international institutions see the 'international community' in action. In legal terms, claims for action that is worthy of a true 'international community' typically appear as calls for agreement on ambitious treaty regimes with limited carve-outs, for broad powers of institutions set up by treaties (which must enable effective action on behalf of the 'international community'), or for the consistent use of powers vested in them. For present purposes, these debates are best read as attempts to inscribe lofty community visions into international law.

In the case of the UN Charter, and the Charter's peace and security design more particularly, these debates are particularly acute. The UN Charter is at the vanishing point of most 'international community' schemes – and the 'peace machinery'⁶² set up by it at the vanishing point of the Charter (cf. Lauterpacht 1952: 382). Unsurprisingly, it is seen as a test case for the 'international community', and since an analysis of the Charter's regime reveals significant progress and remaining challenges and points to tensions between different variants of 'international community' schemes, it is an instructive test case.

The starting point, to be sure, is relatively straightforward. The Charter views inter-state conflict as a major community concern; it addresses it by restricting the unilateral use of force by states and by empowering a Charter organ, the Security

⁶¹ As Giorgio Gaja anticipated in 1981; hence the title of his Hague lectures: Gaja (1981: 271).

⁶² The term is Jessup's: see Jessup (1960: 18).

Council, to respond to breaches of peace and threats to it.⁶³ This seems fully in line with institutionalist and liberal understandings of an 'international community': a significant prerogative – the right to use military force – is centralised (or 'institutionalised') in the hope of establishing a more peaceful international order; henceforth it is meant to be exercised by a trustee on behalf of the Charter's 'international community'. The Charter implemented these community postulates with a significant dose of pragmatism, however. In the (often misplaced) hope of facilitating effective action, it set up the trustee – the Security Council – as a relatively small body with relatively stable membership, gave it significant discretion in fashioning responses, and recognised the veto power as a price worth paying to bring significant trustees on board.⁶⁴ What is more, while the UN counts a plenary body and an international court among its principal organs,⁶⁵ it has relegated them to the margins of its 'peace machinery' (Jassup 1960: 18).

In the UN practice of the last seven decades, the Charter regime has undergone significant modification. Elements of this practice can be rationalised as an attempt to bring the Charter law into line with the demands of a true 'international community'; other debates reflect a 'conflict between community institutions and community values'.⁶⁶ Three aspects can be distinguished.

First, the Charter regime has been flexibly adjusted to facilitate some form of institutionalised response even where the Charter scheme could not be implemented as planned. As the vision of effective, centralised Security Council action never really reflected reality, adjustment has notably involved the development of forms of 'substitute performance', which would enable the UN to respond somehow. Proposals to upgrade the role of the General Assembly (to replace a paralysed Council) under the *Uniting for Peace* procedure of GA Res. 377 (V) are an early, and the most prominent, example.⁶⁷ Perhaps they were too radical to meet with general approval, but they have never been formally discarded. Later

⁶³ See Article 2(4) and Chapter VII of the United Nations Charter. Thomas Franck notes perceptively: 'On its face, the UN Charter, ratified by virtually every nation, is quite clear-eyed about its intent: to initiate a new global era in which war is forbidden as an instrument of state policy, but collective security becomes the norm ... This new way of ensuring peace and security was to be the prescribed cure for the disorders so evident in the first half of the twentieth century: passivity in the face of aggression – Manchuria, Ethiopia, Czechoslovakia – and the egregious pursuit through violence of narrowly perceived national interests. The Charter text embodies these two radical new concepts: it absolutely prohibits war and prescribes collective action against those who initiate it': see Franck (2002: 2).

⁶⁴ See Articles 23, 24, 27 and 39 of the UN Charter.

⁶⁵ Namely the UN General Assembly and the International Court of Justice: see Article 7 of the UN Charter.

⁶⁶ Paulus (2001: 325), 'Konflikt zwischen Gemeinschaftswerten und –institutionen'.

⁶⁷ See UN General Assembly 377(V), in whose first operative paragraph, the General Assembly '[r]esolve[d] that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.'

decades saw less intrusive forms of adjustment, notably the move towards a practice of military enforcement *authorised* (but not otherwise controlled) by the Security Council, viewed by most commentators as a useful 'outsourcing' of enforcement power.⁶⁸ The increasing reliance on regional organisations as enforcement agents (at times with merely *ex post facto* authorisation⁶⁹) has posed more significant problems, but it too reflects the UN's willingness to apply the Charter system pragmatically.⁷⁰ For the most part, proponents of 'international community' projects have viewed these attempts favourably, as they have increased the likelihood of effective UN action in defence of community interests⁷¹.

Second, the mandate of the UN's 'peace machinery' (Jessup 1960: 18) has been significantly expanded, and today encompasses aspects which, in 1945, would have been considered well within the *domaine réservé* of states. As is well-known, once rescued from paralysis, the UN Security Council during the 1990s began to tackle a diversity of 'threats to the peace', ranging from inter-state conflict to humanitarian crises within states.⁷² A broad reading of its Chapter VII powers notably enabled the Council to transform itself into a defender of fundamental human rights. This extension of the Charter's peace and security regime was enthusiastically welcomed by adherents of 'international community' projects – in fact, it is the single most significant factor explaining the rise to prominence of these projects in the decade after the end of the Cold War. It saw an alignment of liberal-cosmopolitan and institutionalist hopes, as a UN organ was taking a leading role in defence of liberal values. Paragraph 139 of the 2005 World Summit Outcome reflects such an alignment:

'The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'⁷³

Third, in other areas, this alignment has been put to the test. The Security Council's more recent practice of targeted sanctions against individuals is a case in point: the 'listing' of terror suspects, coupled with mandatory restrictions on rights and limited options for scrutiny, has reignited concerns about the Council's

⁶⁸ Ziccardi Capaldo (2008: vi) speaks of a 'public-private approach to law enforcement'. See also Franck (2002: 24), et seq.

⁶⁹ See SC Res. 788, SC Res. 1132, accepting the intervention of ECOMOG, and Walter (1996: 289–309).

⁷⁰ For excellent accounts see Walter (1996); as well as Kamto (2007: 771).

⁷¹ See e.g. Franck (2002: 1), emphasising the '[t]he United Nations' capacity for adapting to radical changes of circumstance'; Delbrück (1999: 139); and Payandeh (2010: 375), et seq.

⁷² In the words of Franck (2002: 43), '[t]he gradual attrition, in UN practice, of states' monopoly over matters of "domestic jurisdiction" has occurred in tandem with an expansion of activities and conditions seen to constitute "threats to the peace"'. In his analysis of Article 39 of the UN Charter Commentary, Nico Krisch offers a panorama of 'issues' that the Security Council has viewed as triggering Chapter VII of the UN Charter: see Krisch (2012b) paras. 12–44.

⁷³ GA Res. 60/1 (2005).

compliance with human rights.⁷⁴ For adherents of 'international community' projects, this practice poses a dilemma: effective institutional action against terrorism needs to be balanced against the demands of human rights compliance. Liberal-cosmopolitan scholars have tended to emphasise the limits of *Security Council* powers, and placed hope in forms of decentralised control by domestic and regional courts.⁷⁵ Cases like *Kadi* pit individual freedoms against effective institutional action – a situation that many international lawyers, otherwise used to being told that 'their' discipline lacked teeth, perceived as a novel challenge.⁷⁶

The second pen portrait outlines the UN Charter's attempt to implement a particular vision of the organised 'international community'. It highlights that, within organised treaty regimes, much depends on the proper construction of competence norms. In this respect, the Charter has, from the beginning, placed considerable trust in the Security Council. Having broadly construed its powers under Chapter VII, the Council today is able to act against a very broad range of threats to the peace. Put differently, the law of the Charter has been adapted and can now be used in defence of core values of the 'international community'. By contrast, the Security Council's decision-making process has not been adapted; as a consequence, the veto power remains a significant obstacle that regularly prevents effective institutional action.

(d) The 'international community' and the law of state responsibility

In debates about state responsibility - the third and last pen portrait offered here - the 'international community' appears yet again in a different light.⁷⁷ Compared to the UN Charter's collective security regime, the topic of state responsibility may seem technical and dry. As understood by the UN International Law Commission, its main architect, it comprises 'the general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'.⁷⁸ Pursuant to the ILC's influential restatement,⁷⁹ the law of state responsibility is general in scope (i.e. it potentially applies across the board), but also residual (so that it yields to specialised regimes).⁸⁰ That residual framework forms part of customary international law, and operates as a horizontal, decentralised system between states. As a consequence,

⁷⁴ For a detailed discussion see Tzanakopoulos (2011).

⁷⁵ See e.g. de Wet (2004); and the clear analyses offered by Tzanakopoulos (2012: 42); Krisch (2012a), paras. 38–52.

⁷⁶ See e.g. Kokott; Sobotta (2012: 1015).

⁷⁷ For a fuller treatment of the issues canvassed in the following see Paulus (2001), 386 et seq.; Villalpando (2005).

⁷⁸ See para. 1 of the ILC's Introductory Commentary to the Articles on State Responsibility, in Yearbook of the International Law Commission 2001, vol. II/2, 31 ('Articles').

⁷⁹ This restatement culminated in the adoption, in 2001, of a set of 59 Articles, which the UN General Assembly commended in GA Res. 56/83 and which are in large measure said to reflect customary international law. The text of the *Articles* is annexed to GA Res. 56/83 and reproduced, with detailed explanatory commentaries, in volume II/1 of the 2001 Yearbook of the International Law Commission 2001.

⁸⁰ For the latter aspect see Article 55 of the ILC's Articles enshrining the *lex specialis* concept).

the law of state responsibility, unlike much of contemporary international law, is non-institutionalised.

While remaining non-institutionalised, the law of state responsibility has undergone a significant transformation. Of the various areas of general international law, it has perhaps been most receptive to 'community-type' arguments. In subtle and significant ways, the traditional law, mainly developed in processes of bilateral (typically inter-state) claims, has been opened up to accommodate the needs of a legal order that protects community interests and enshrines rights of individuals and other non-state actors. The main conceptual shifts have been discussed in depth elsewhere,⁸¹ and thus can be presented here in summary form. Three aspects stand out:

First, the ILC's work has freed the general law of responsibility from traditional concepts of damage and fault. In the (somewhat confusing) terminology, responsibility has become 'objective': a breach of the law is sufficient to trigger it, irrespective of whether that breach was based on culpable conduct, and irrespective of whether it caused tangible, measurable harm to another actor.⁸² Liberated from some of its traditional baggage, the law of responsibility has become 'fit for purpose', i.e. fit to govern obligations outside reciprocal relations, notably those protecting collective interests or rights of non-state actors (Pellet 2001: 290–1).

Second, the 2001 *Articles* make significant room for the enforcement of collective interests.⁸³ As a horizontal regime, they do not formulate enforcement powers of international institutions. However, the *Articles* recognise significant rights of other states to defend collective interests and interests of non-state actors. This they notably do by conferring upon individual states a right to respond to breaches of obligations that protect community interests. Under Article 48 of the ILC's text, any individual state is entitled to invoke another state's responsibility towards the 'international community' as a whole. Drawing on the jurisprudence of the International Court of Justice, which decades earlier had recognised that all states have a legal interest in the protection of certain fundamental obligations (which the Court termed 'obligations erga omnes'), the provision operationalises a liberal-cosmopolitan vision of a community in which shared values can be enforced not just via international institutions, but also decentrally, by individual guardians of community interests.⁸⁴ Whether such decentralised enforcement could also include non-forcible measures of coercion (such as trade boycotts or travel bans) remained contentious until the very end of the ILC's work. Perhaps understandably, given the risk of abuse and the general scope of the law of state responsibility, states and the ILC were unwilling to recognise the lawfulness of 'third party countermeasures' expressly. However, they were not ruled out either: hence Article 54 of the ILC's

⁸¹ See notably Simma (1989: 821); Pellet (2001: 285).

⁸² Article 2 of the ILC's *Articles*.

⁸³ The following draws on Tams (2005), notably chapters 5 and 6; as well as Tams (2011: 379).

⁸⁴ Tams (2011: 383), et seq.; Crawford (2011: 221).

text contemplates the possibility of 'lawful measures against that state to ensure cessation ... and reparation'.⁸⁵

Third, rather more cautiously, the *Articles* seek to mobilise states to defend core values of the 'international community'. They do so by identifying a regime of aggravated responsibility, which draws on the idea of a solidarist 'international community' that stands united against outsiders.⁸⁶ This regime applies to serious infractions of peremptory norms, among them acts of aggression, of genocide or systematic abuses of fundamental human rights.⁸⁷ Faced with such egregious violations, Article 41 imposes upon all members of the 'international community' a duty of non-recognition, and enjoins them to 'cooperate to bring to an end through lawful means any serious breach' of a peremptory norm. As has often been observed, this is a fairly modest regime of aggravated responsibility⁸⁸: one that lacks real teeth, and pales in comparison to the ILC's initial (more ambitious and more controversial) plan to formulate a comprehensive regime applicable to egregious breaches designated as 'crimes of states'.⁸⁹ But the move from the ambitious and controversial to the modest and acceptable version of aggravated responsibility helped ensure the relatively smooth acceptance of the ILC's text by states.

All things considered, though, the third pen portrait suggests that the 'international community' has left a relatively heavy footprint on the law of state responsibility. The contemporary regime, as set out in the *2001 Articles*, is non-institutionalised. However, in line with liberal-cosmopolitan visions, it facilitates the decentralised enforcement of community interests by third states.

5 Concluding Reflections

The three sample tests reflect the role of international law as a site of contestation about different visions of international order, but of course they represent no more than the tip of the iceberg. Just as in debates about law-making, collective security and state responsibility, the 'international community' is making itself felt elsewhere – in discussions about climate change (which 'must unite the international community again', as the UN General Assembly was told shortly before the opening of the Paris COP21 summit⁹⁰), about peace in the

⁸⁵ See Article 54 of the ILC's *Articles*. For a more 'robust' approach, endorsing an express right, see Tams (2011: 389) et seq.; Tams, *Enforcing Obligations Erga Omnes* (2005), ch. 6.

⁸⁶ See Articles 40, 41 of the ILC's *Articles*. For a clear analysis see Talmon (2006: 99); Christakis (2006: 127).

⁸⁷ See Article 40 of the ILC's *Articles*, whose second paragraph defines a serious breach as one that 'involves a gross or systematic failure by the responsible State to fulfil the obligation'.

⁸⁸ Talmon (2006: 125) notes perceptively that '[t]here is more authority for the obligation as such ... than for its particular content'.

⁸⁹ See Article 19 of the ILC's first reading *Articles* (1996); and cf. Paulus (2001: 386), et seq.

⁹⁰ See statements reproduced in UN General Assembly (2015), taking up a statement by Freundel Stuart, Prime Minister of Barbados.

Middle East, and about responses to the global financial crisis. In these instances, and in many more, the 'international community' has become an accepted point of reference; it is ubiquitous. In other words, the concept has been widely accepted despite disagreement on what it means.

In the process, it has lost many of its contours, and much of its force. Quite how a proper law of the 'international community' should look is by no means certain – because the content of the concept itself is so diffuse: the 'international community' is (and in debates about international law appears as) a 'vehicle of convenience'⁹¹ that is waiting to be filled with meaning. And of course, once filled with meaning, the concept needs to be woven into the fabric of international law. This process has certainly begun, but it is cumbersome, and has yielded mixed results so far. The three pen portraits offered in the preceding section suggest that in that cumbersome process, references to the 'international community' offer an impulse towards reform, or a particular understanding of international law – but they do not control. All this means that the 'international community' concept can never quite deliver what it promises – but that attempts to discredit it as a dangerous notion inviting abuse are equally futile. The 'international community' has become part of the canon of international law: it helps structure debates, and it is a vague and flexible benchmark against which international law is assessed.

⁹¹ Contrast Annan (1999), 'sceptics are wrong' when viewing the concept as 'a mere vehicle of convenience'.

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The International Community and the Autonomy of International Law: Response to Christian Tams

A Commentary by Theresa Reinold

Introduction

I found much to agree with in Tams' piece - his contribution is as well reasoned as his claims are uncontroversial. So rather than offering a rebuttal to Tams, this comment will reflect further on the role of the international community in international law-making, especially as regards its contribution to ensuring the autonomy of the law from the political sphere. Generally, Tams is somewhat oblivious to the relationship between politics and international law, more specifically to the possibility of powerful states invoking the alleged values of the international community to universalise their particularistic norms, and thereby cement existing structures of inequality. The misuse of international law as an instrument of domination is one of the core themes of critical legal scholarship (CLS) – a school of thought which Tams mentions only in passing. Yet even if one accepts CLS's argument about law being a product of political power, this does not mean that powerful states can make and remake international law as they see fit. International law does enjoy a certain autonomy from the political sphere - but what is the foundation of this autonomy? Theorizing the autonomy of international law might seem like an unfitting task for a political scientist, but neither international lawyers nor international relations scholars are condemned to the kind of reductionist arguments legal utopians and structural IR realists have succumbed to in their respective disciplines. The question of the law's autonomy is especially acute in the international realm due to the openness of international law's secondary rules of recognition and change: In the area of custom formation, for instance, political, even plainly illegal acts may have a direct impact on the substance of the law. Thus, the autopoietic notion of normative closure, which accounts for the autonomy of the law in the domestic sphere (Lempert 1988: 158; Teubner 1988: 2), does not apply to the international realm. The autonomy of international law must therefore rest on a different basis – which is where the concept of the international community comes in: In order to create the intersubjective quality necessary to turn subjective legal claims into positive international law, powerful actors must not merely pay lip service to, but actively construct normative fit between, their legal claims and the values of the international community at large. This requirement is what renders international law at least partially autonomous from political interference.

International law as an instrument of domination?

This comment focuses on one dimension of international law-making, namely the process of custom (trans)formation, but will touch upon treaty law as well. Tams discusses custom formation in section 4, where he assesses – based on three case studies – to what extent contemporary international law reflects international community interests. However, Tams' analysis is mainly empirical, not theoretical, in nature, and the nexus between secondary rules and the autonomy of international law is not addressed. Reflecting upon the role of the international community in the legal process, Tams emphasises a number of points, which according to him, seem relatively obvious, but are 'surprisingly often not made', including the claim that international law is a site of contestation, involving actors from the global core as well as the global periphery, whose visions of international law often collide. However, these aspects of international law *have* actually been the subject of a voluminous literature – witness, for instance, the TWAIL (Third World Approaches to International Law) movement.¹ Yet Tams' reasoning sidelines the issue of power politics in international law-making, neglecting the fact that what is seen as universal, as the collective interest of the 'international community', is often the particular, crystallizing into positive law because other actors accept the particularistic hegemonic norm as a universal one – the subjective thus becomes intersubjective. According to TWAIL scholars, reference to the interests of the international community should be treated with a healthy dose of skepticism, because this reference is often exploited by powerful actors who, in the name of supposedly universal interests, bend and break the law as they see fit. '[U]niversality,' Mutua writes, 'is always constructed by an interest for a specific purpose, with a definite intent ... The question, therefore, is how local truths are legitimately transformed into universal creeds, what value judgements are made, who makes those judgements, how they are made, and for what purpose' (Mutua 2000: 21). Invoking the 'international community' in legal discourse, according to critical legal scholars, is thus merely a figleaf to legitimise the pursuit of the narrow national interests of powerful states.

While I have some sympathy for this argument, I believe the matter is actually more complex than that. To be sure, reference to the alleged values of the international community is often merely cheap talk, yet the concept of the international community is a knife that cuts both ways: its invocation can contribute to legitimizing and thereby reifying a Western-centric global order, yet it must be emphasised that international law cannot be made and remade by unilateral fiat – not even by the most powerful actors in the system. Thus, if powerful actors seek to universalise their own norms, they must make an effort to construct coherence – 'normative fit' – between their own values and those held by the international community at large. Blatantly self-serving attempts at changing international law will fail if the powerful actors do not succeed in obtaining intersubjective consensus that the intended change is in the interest of the

¹ Recent TWAIL scholarship includes Anghie (2006); Anghie und Chimni (2003); Baxi (2006); Buchanan (2008); Gathi (1998/1999); Gathi (2000); Mickelson (1997/1998); Mutua (2000); Okafor (2005); Otto (1996); Rajagopal (1998/1999); Rajagopal (2000); Rajagopal (2006).

international community as a whole. The 2003 invasion of Iraq provides an instructive example in this regard: The strongly negative reaction of the international community to the US intervention reaffirmed, rather than weakened, existing rules on self-defense, and prevented the emergence of a new expansive right to preventive war as posited by the United States.

Legal autopoiesis and the concept of normative closure

According to the theory of legal autopoiesis, legal systems may be irritated from the outside and are thus 'cognitively open', yet they remain 'normatively closed' and therefore evolve only in accordance with their internal logic (see, e.g., Luhmann 1988a: 20; Teubner 1988: 2). Legal autonomy according to autopoietic theory therefore does not mean that the law is impervious to political influences; it only means that the law itself sets the parameters for legal change. The legal system thus produces its elements according to its own logic, i.e. its layer of secondary rules, such as rules of recognition, which define the sources of law and thereby separate law from non-law. This self-referentiality is seen as the very basis of the law's autonomy. If moral or political communications were allowed to directly trigger changes in the legal system, the autonomy of the legal system would be imperiled (Luhmann 1988b: 347).

However, in the progressive development of international law, the distinction between legal and illegal, *lex lata* and *de lege ferenda*, is often difficult to uphold. Because of the openness of international law's secondary rules, the international legal system cannot be regarded as normatively closed. International law is not a static system but a dynamic social process in which inconsistencies within the legal system, but also contradictions between legal and important non-legal norms held by the international community provide an impetus for legal change. Thus, if one accepts that influences from the political system may have a direct effect on the reproduction and possibly transformation of elements of the legal system, the autonomy of international law must be conceptualised differently than that of domestic law, and here the concept of the international community plays a crucial role.

The openness of international law's secondary rules: *ex iniuria ius oritur*

As outlined above, Luhmann and associates assume that the legal system's secondary rules prevent political variables from having a direct effect on the content of the law. I am not sure this is true for domestic legal systems (think about judicial discretion in the progressive development of the law in common law

systems – the doctrine of *stare decisis* notwithstanding); but it is certainly not true for international law, where secondary rules do allow for a direct translation of political preferences into legal substance. While theorists of legal autopoiesis accept that the initial impetus for legal change usually comes from the political sphere, the process of translating political preferences into legal substance is governed by the secondary rules of the legal system. The principle *ex iniuria ius non oritur* is commonly believed to shield the law from political manipulation. However, in both treaty and customary international law, non-compliant behavior is actually an important source of legal innovation: in customary international law, breaches of the law initiate a process of claims and counter-claims in the course of which states' *opinio juris*, and thus the customary norm in question, potentially undergo modification. In the area of treaty law, the possible modification of treaties through subsequent practice – state behavior which is technically *ultra vires* – has a basis in state practice and has also been acknowledged by a number of legal experts (see, e.g., Bianchi 2009; Pauwellyn 2003; Schwarzenberger 1967).

With regard to customary international law, in an often-quoted statement, Anthony D'Amato maintains that 'an illegal act by a state contains the seed of a new legality. When a state violates an existing rule ... the illegal act itself becomes a disconfirmatory instance of the underlying rule ... eventually a new line of conduct will replace the original rule by a new rule' (D'Amato 1971: 97). However, the 'seed' sown by a law-violating state will not always lead to the 'blossoming' of a new rule. If this were indeed the case, international law would cease to perform its stabilizing function, that is, to guarantee a modicum of predictability in an otherwise very unpredictable world. Thus, while it is true that the law needs to be responsive to state interests in order not to slip into insignificance, it is also true that legal norms that are infinitely pliable cease to perform their legitimizing function, and that the requirement to construct normative coherence with the values of the international community precludes self-serving changes of the law by powerful states. *Ex iniuria ius oritur* thus only applies to cases in which the international community at large accepts a particular breach of the law as a source of normative innovation.

In the field of treaty law, there are quite a few precedents of treaties having been modified through subsequent practice, yet within the scholarly community the transformative effects of subsequent practice are contested. Georg Schwarzenberger (1967: 168) writes that *de facto* amendment of a treaty may occur as 'the result of a gradual and inarticulate process of departure from consensual engagements without overt objection from other contracting parties'. Joost Pauwellyn (2003: 50) and Andrea Bianchi (2009: 659) also acknowledge the possibility of treaty modification through subsequent practice. The ILC has also taken up the issue. Quoting the International Court of Justice (ICJ) which, in its decision on the Dispute Regarding Navigational and Related Rights maintained that 'subsequent practice of the parties, within the meaning of Article 31(3)(b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement,' the ILC cautions, however, that it remains unclear whether the ICJ thereby effectively recognised that subsequent practice may have treaty-modifying effects, or whether the Court was merely referring to the reinterpretation of treaties (International Law Commission 2014: 50).

Consequences for the autonomy and the rule of law

Just as with the progressive development of customary international law, the possibility of modifying treaty provisions through subsequent practice raises thorny issues for the foundations of the international legal order, because acknowledging the law-generating effects of non-compliance challenges the presumption that the law ought to be complied with. On the other hand, as the ILC itself admitted, as 'important treaties reach a certain age ... the context in which they operate becomes different from the one in which they were conceived. As a result, it becomes more likely that some of these treaties' provisions will be subject to efforts of re-interpretation, and possibly of informal modification' (International Law Commission 2008: 370) in order to ensure that the values enshrined in these treaties reflect the changing values and political preferences of the international community as a whole. Compared to domestic legal systems, international law's mechanisms for adapting its rules to changing political circumstances are somewhat underdeveloped, and while compliance should be the norm, occasional departures from this norm are sometimes necessary to 'modernise' the law, i.e. ensure its continued relevance in a changing geopolitical context. As in common law processes, where the stability of precedent is occasionally sacrificed for the attainment of important political objectives, in the process of international law-making fidelity to past legal practices will at times have to give way to new political realities. In both customary and treaty law the maxim *ex iniuria ius non oritur* is thus not tenable as a categorical principle of law (trans)formation.

Having established that international law defies the autopoietic notion of normative closure, does this mean that international law enjoys no autonomy from political power? Not necessarily. I submit that it only means that international law has different ways of securing its autonomy, namely through the requirement of constructing coherence, or normative fit, with the values held by the international community as a whole. This principle imposes constraints upon powerful agents seeking to change international law. Normative structures cannot be changed by unilateral fiat; instead, even the most powerful actors in the system must make sure that their actions are not perceived as being dissonant with intersubjectively agreed norms – legal and/or non-legal. If they fail to do so, their norm entrepreneurship will not be successful and international law will resist change. Thus, even though the secondary rules of the international legal system do not preclude the possibility that violations of the law may change its substance, these rules nonetheless require that attempts at legal innovation be consistent with the values of the international community. If a particular breach of the law is not met with nearly universal support or at least tacit acquiescence, this breach will not trigger changes in the international legal system. This bars powerful actors from unilaterally changing the substance of the law to legitimise their parochial interests, thereby ensuring the relative autonomy of the law.

Conclusion

In this comment I argued that it would be wrong to equate the international legal system's openness to political stimuli with a lack of autonomy – on the contrary, it is precisely because of international law's ability to adapt itself to a changing environment that the law retains its (partial) autonomy, legitimacy, and ultimately its compliance pull. To be sure, autonomy and legitimacy are two different concepts, yet there is a close connection between them. Only a law that maintains a certain independence from political power will be regarded as legitimate, and – in the absence of an international enforcement mechanism – legitimacy will be critical to ensuring compliance. If legal structures are viewed as being merely an expression of the particularistic interests of powerful agents, all the while being at odds with the intersubjective understandings held by the international community, this will undermine the law's legitimacy. Consequently, attempts by powerful agents to reshape legal structures which evoke dissonance with fundamental values of the international community will leave existing legal structures intact. Hence the requirement of constructing normative fit with the values held by the international community not only explains how and why international law changes – and, at times resists change – it also forms the basis of international law's partial autonomy from power politics, and hence its legitimacy. Thus, I agree with Tams that international law 'needs to be filled with life, accepted, and considered legitimate'; if these conditions are met, the law can maintain its relative autonomy from the political sphere.

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